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# REVIEW AND ANALYSIS OF FORECLOSURE AND REAL PROPERTY LAW EGYPT FINANCIAL SERVICES PROJECT Technical Report No. 28

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## **Scope of work**

I was in Cairo, Egypt from May 20, 2005 through June 1, 2005 performing a review of foreclosure and real property law. The following is a summary of my goals, work, observations and conclusions. I was to review Finance Law of 2001, regulations, amended regulations thereunder and Civil and Commercial Codes. I was to report on part of the law that is contradictory or unclear. I was to report on how the law is implemented in the Courts. I was to meet with legal experts in Mortgage Financing and write a final report with recommendations on improvements to the laws and processes related to foreclosure. My report was to include the advantages/disadvantages of passage of a non-judicial foreclosure law.

## **Overview of work**

I first reviewed the Finance Law of 2001, regulations, amended regulations, the Civil and the Commercial Law where applicable. Second, I met with representatives of the MFA, and with representatives of the mortgage companies making loans under the new finance law. Third, I met with the Ministry of Justice representatives. Fourth, I went to both the Courts and Registration offices (one using a deed system and the other using a title computer system). Fifth, I met with representatives of the Administration of Justice Support II project. Sixth, I met with a local lawyer who is on contract with EFS and an expert in civil and commercial litigation, Mr. Ahmed G. Abou Ali. I also met with Mr. Mohamed B. Sameh Talaat an attorney with Baker & McKenzie, an expert in commercial law. Seventh, I met with representatives from the National Society General Bank and Abdul Hakim el Taweel, General Manager of the legal department of the Faisal Islamic Bank. Lastly, I attended a post degree thesis presentation presided over by Dr. Sameh El Torgman, concentrating on real estate finance.

## **Review of Finance Law, the Commercial and Civil Codes, and observations of the Courts and Registries, and meetings**

### **A. The 2001 Finance Law**

In 2001, a new Finance Law was enacted providing for private mortgage companies being set up to lend (finance) money to borrowers (investors) for investors to buy, construct, and/or improve their homes and their commercial abodes. As I understand it, the goal of the new law was to encourage financing of properties secured by only the property in issue and not to require other collateral or guarantees.

Egypt has in place a judicial foreclosure procedure which contains all of the necessary elements for foreclosure under the new Finance Law of 2001. For instance, notice by lender to all necessary parties is required, filings with the court are required, and the court must approve the foreclosure process in all respects including the employment of brokers and appraisers working on the sale. There are specific requirements in place for minimum bids. In addition, the lender is prohibited from bidding on the property unless there are no other bids above the minimum and the lender agrees to release the borrower from the deficiency on the loan. Appraisers have no deadlines in performing the legally required appraisal of the property and the Judge is given no deadline to assign the property to a realtor for purposes

of the sale. Realtors have no deadlines to sell the property. The law has deadlines for the lender to send out notices of foreclosure and to file documents in the appropriate government offices. There is either no bond or a low bond requirement if the borrower contests the foreclosure.

Generally, judges come from the Ministry and are experts in criminal law (although this is not required). They have no expertise in civil law including foreclosures. Furthermore, judges rotate often making it difficult to gain expertise in a specific area. The Finance Law is a much simpler law than the Civil Code which deals with mortgages in general. Under the Civil Code, judicial foreclosures have the reputation of never getting concluded, especially because third parties who claim an interest in the property could intervene and prevent the foreclosure until their claims are resolved. As I read it, the new law is much simpler, contains specifics as to how to proceed, and does provide some time limits. Most importantly, under the new law, third parties claiming an interest in the property may not intervene and slow down the foreclosure process. The Court ruling shall comprise a writ of delivering the realty empty of its occupants to person in whose favor the sale adjudication ruling is passed. The law makes clear that the sale must be under the supervision of the Court, ostensibly to protect the borrower and in particular, to protect the borrower from losing his home.

## **B. Meeting with Mortgage Company Representatives**

There are only two mortgage companies at this time and they have made only a few loans. The mortgage companies are concerned about: (i) lack of complete registration; (ii) the fact that foreclosure laws will embroil the lender in the court system; and (iii) the lack of time limits on many of the procedures under the foreclosure law. For instance, the Court is under no deadline to select the appraisers or approve the foreclosure. It was also noted that the foreclosure law does not deal with the issue of eviction of family and tenants. The representatives of the company believe that the time to complete the mortgage process under the foreclosure law could easily take 6 months under the best case scenario but more likely over a year.

The mortgage company representatives did point out that this issue does not stop loans from being processed since they have in place other collection devices and most importantly the check system requiring checks to be written by borrower and held as security in the event of default. If a check is presented and is dishonored this is a criminal offense which would cause the borrower to go to prison, something most borrowers will avoid at all costs.

## **C. Meeting with Representatives from the Ministry of Justice**

The Ministry of Justice Office, which was responsible for writing the new Finance Law and regulations, believes that the necessary elements of foreclosure law are in place. The Civil Code requirements have been greatly simplified. Ultimately, training of the judges will be necessary, however, because only a few loans are in place at this time, none of which are in default, this is not immediately necessary. The training will be done by the senior judges. The Ministry Office did not think it was necessary for us to speak to the judges since they have yet to be trained. The law is a balance between protecting the lender and the borrower. The Ministry of Justice Office believes that lenders want to loan (lend) and they are not afraid of the foreclosure law.

#### **D. Meetings with the MFA Representatives**

The MFA representatives believe that the foreclosure process is in place and that it is a very easy and fast process. Lenders will be dealing with an execution judge unlike a civil controversy judge. There are two execution judges in every district who handle foreclosures when they happen. If there is a complaint by the borrower then the matter is transferred to the civil court for adjudication. MFA believes the execution judges need to be trained. MFA believes the law is perfect but there is fear that the judges will not implement the law. MFA is concerned about the social issues in the country, i.e. evicting tenants. The way the law is set up there will be plenty of notice to borrowers to settle their debts and not risk the loss of their properties. In addition, not only are mortgage companies collateralized by the property but there is also an insurance fund that protects the lenders by guaranteeing three payments. Registration is the real problem and not the foreclosure law. There was mention of the fact that loans are made even without registration so long as a power of attorney is obtained and moneys are held back until registration completed. The average loan is about \$500,000 lbs.

On a second visit with Mr. Akram of the MFA, we discussed some changes to the present regulations such as providing for back up bidders at the auction and setting specific times for the judges to decide certain issues under the foreclosure law.

#### **E. Observations at the Courts**

Courts are crowded, very busy, and appear to be short staffed. Judges work two days a week for about 2 hours at the courts and work the rest of time at home. Most of the non-criminal cases seemed to be continued. No court reporter is present with the judges in the court room. There is a court clerk, however, who takes notes. No computers are in the court rooms or apparently in the clerk's offices. Files are kept in loose binders in various rooms in the court house. From my questioning of lawyers, I find that most cases last about 5 years before they are resolved at the initial court stage. I also learned that judges receive credit for resolving cases, so they try to resolve very simple matters such as approving a document for parties where there is no dispute. The judges on behalf of the government also receive a fee for such work.

I also learned that criminal cases are more quickly resolved and penalties are severe for such crimes as writing bad checks. This will result in a prison sentence. The judges work in three court panels unless the court is an execution court where in that circumstance there is only one judge. The decisions of the Court are based on the statutes and regulations and not court precedents. Litigants must be represented by lawyers. If a litigant does not have a lawyer, the Court will assign one to him.

#### **F. Observations at the Registries**

I went to the Registry that is still using the old deed system and is not computerized. The impression I have is that one is in a maze where everything takes a very long time to resolve. It can take about 10 days to find out information regarding ownership of property. It is very likely an applicant will have to come back several times to complete his business. I also went to the Registry in Dokki which is now computerized and using the title system. There, information regarding ownership can be obtained within a very short period of time. The clerks are very helpful and are using computers, scanners, and copiers to help with their

tasks. The public is not able to search the records themselves but must place an order with a clerk. It has been suggested to me that payment of moneys to the clerks can speed up the process. I did observe the three party contracts that are reflective of liens impressed on the contracts and appropriately notarized.

#### **G. Meeting with the Administration of Justice Support II Project**

A helpful meeting confirmed that the objectives of our respective offices could be accomplished if we work together. The Administration of Justice Support II project's mission includes training judges, but the project is in need of expertise in the new Finance Law and regulations in respect to foreclosures.

#### **H. Meeting with Commercial Lawyers**

I also met with Mr. Ahmed G. Abou Ali and Mr. Mohamed B. Sameh Talaat who are commercial lawyers. Mr. Ali confirmed that the legal procedure is very protracted and a case could last as long as ten years before resolved. In the context of foreclosures, as discussed above, Egypt under the Civil Code has had a mortgage law and foreclosure procedure for some time. Under the new finance law, the foreclosure procedure is refined in the context of mortgage company financing home loans. While the new law gives more specific deadlines for completion of certain tasks involved in foreclosure (i.e. notice periods to the borrowers), the previous law itself was not the main problem, but rather the court system which does not require judges to decide cases or the court experts such as the appraiser to complete his work. One of the main issues that arises in the the context of foreclosures is that the borrower disputes the amount of the loan in default and outstanding. Mr. Ali explained there is a deficiency in many of the loan papers which is really a problem with the lenders. It appears lawyers are not necessarily involved in many of the loan transactions until there is a default in the loans. In respect to the court system, Mr. Ali emphasized that the judges continually rotate and so have little expertise in any area of the law and it is unlikely they can decide a matter from the bench. Rather, they need to study it before rendering a decision. Unfortunately, by the time they might have completed their study of the case, another judge or judges are assigned the case.

Mr. Ali confirmed that under the best of circumstances, foreclosure under the Code could take about 12 months to complete. This is assuming no objections from the borrower to any of the process of the foreclosure. Under the new finance law, under the best of circumstances, he felt the process could be completed in about 9 months (assuming no objections from the borrower). In the event of appeal under either law, the sale will not be completed absent resolution of the appeal. A bond is not required as a condition of the appeal.

Mr. Ali did not think that the court system is the primary factor in either a lender lending or not lending in transactions secured by the borrower's home. Major issues for the banks are the default factor, the income or lack of income of the borrower, and the registration system. While foreclosure process through the courts is a factor, it is not a primary one.

Mr. Ali mentioned that many of the lawyers in Egypt are not experts in the mortgage laws. Mr. Ali discussed the insolvency and bankruptcy laws in Egypt. Under either scenario, a foreclosing party may continue the foreclosure process. However, the priority of taxes and Government fines, as is the case outside of insolvency or bankruptcy, is still recognized.



Mr. Talaat made it clear that the foreclosure law can not work given the registration system. Lenders will not lend under the finance law until properties are registered. According to Mr. Talaat, only 10 percent of properties are registered. Mr. Talaat does believe the new foreclosure law under the finance law is much better than the old Civil Code since it provides specific procedures and time deadlines. However, Mr. Talaat is concerned about courts and particularly the judges who are untrained in this law and consequently would not be aware of the spirit and purpose of the law (i.e. lend money with only the real estate as the security but at same time permit lenders to have quick results if there is a default.) Mr. Talaat suggested there be special circuits (panels) to handle foreclosures. Mr. Talaat states for cultural reasons non judicial foreclosures would not occur in Egypt. The finance law enacted since 2001 is not working for reasons mostly unrelated to foreclosure issues. There have only been a few loans under this law.

## **I. Meeting with representative of NSGB**

Over the years, the Bank has loaned money secured by real estate, and since the new law, it has made two real estate loans that are current. The bank has not tested the new foreclosure provisions in the new law. However, from reviewing their documents, it appears they have draft provisions that clearly reflect the new law and explain to their borrowers the steps they can and will take in the event of default, including foreclosure.

NSGB recognizes that foreclosures under the court could take a long time. In the past, they have seen cases under the old law lasting between 6 and 10 years. Frankly, NSGB was not optimistic that it will take much less time despite some time tables and prohibition of intervention in the foreclosure under the new law. The Bank was critical of the court bringing in experts to deal with contests on liability between the Bank and the borrower. This process alone can take between two and three years. Apparently there are at least 100 cases with experts at one time and because of such a work load, getting resolution is difficult. Under the new law, the Bank is telling me calculations should be somewhat easier and therefore, the process could be somewhat speedier.

As I suspected, the Bank is not concerned about losing its money. Ultimately, the Bank does get paid in full with or without a foreclosure. Thirty percent (30%) of the cases settle before foreclosure. Fortunately, real estate is appreciating in Egypt at this time.

I also met with representative from Faisal Islamic Bank, Abdul Hakim el Taweel, General Manager of the Bank's legal department. Dr. Hakim confirmed the general perception of the court's slowness in resolving disputes and that his bank has no mortgage contracts under the new law. As he sees the mortgage finance industry, the most important element, secondary mortgage financing, is not taking place. Dr. Hakim confirmed that the Faisal Islamic Bank does not make real estate loans, but rather it sells homes or in respect to some homes it enters joint ventures. (Under that circumstance, the Bank will take a mortgage on its partner's interests.) As to the new finance law, the time limits imposed should speed up the court process. Of course, referring issues to experts still could result in substantial delays in resolving disputes.

I attended a post degree thesis presentation at the American University in Cairo concentrating on real estate finance. Dr. Sameh El-Torgman presided. While the presentation was extensive, the crux of the presentation centered on registration which is essential to mortgage lending. Foreclosure was hardly mentioned in the lecture.

## **Review in detail the new law and applicable regulations**

The primary changes under the law are: (i) increased court supervision; (ii) notice to investors and other interested parties; and (iii) the introduction of experts to assist the court. A summary of important Articles of the new legislation is summarized below.

Article 12 provides for 30 days notice in the event of failure to pay or in the event of jeopardy of security of lender for investor to proceed with payment or submit adequate security. This provision is similar to typical provisions under the U.S. models. (Foreclosures in the U.S. are based on the laws of each of the 50 states and the District of Columbia. Each state and the District of Columbia have different laws. For instance the District of Columbia has a non-judicial foreclosure and judicial foreclosure system.)

Articles 13, 14 and 15 provide that if the borrower does not comply with the notice, the borrower shall be under obligation to pay off the whole loan. If the borrower does not pay off the loan, the lender may request of the court to foreclose on the real estate. Notice of this request must be given to the borrower. Under the laws of Egypt, borrower may contest this request. This is typical of the US models having judicial foreclosure.

Although the statute is silent on the contest procedure, the procedure can be very protracted and includes an assignment of an expert by the Judge to review the accounts of the lender. There is no time deadline for the Court to decide the contest. Notice must be also filed with the Registration office adding the annotation on the registration of the request for foreclosure. The notice must be added to the registration. This is similar to US models.

Article 16 provides for the appointment of a real estate agent by the court at the expiration of the notice period. The real estate agent will sell under the direct supervision of the court. The real estate agent is selected from a list of approved agents established by the Court. The law provides that the Court shall determine the conditions to be fulfilled by the real estate agent, the rules for their compensation, and procedures for recording in the register.

Article 17 is particularly important. Any interested party may ask the Court for replacement of the real estate agent. The court may order the replacement if the allegations are found to be serious. This request does not stay the execution unless the Judge determines otherwise. There is no deadline for the Court deciding the request. There are also no specific criteria for the court to consider in replacing the real estate agent.

Article 18 provides that the Court shall also appoint two appraisers to determine the base price of the real estate to be sold by the real estate agent. The real estate agent based on that appraisal shall comprise the date, time, and location of the sale, the price of the realty and the bond necessary to participate in the auction. The Court shall determine the rules for the computing of the bond. I am told by Shamsnoor Abdul Aziz, an attorney with the Egypt Finance Services Project, that Court practice generally requires 5 percent cash deposit or bank check to participate in the auction. Although the statute is silent on closing, settlement usually takes place between 5 to 10 days after the auction, according to Court order.

Article 19 provides for notice by the real estate agent to the investor, owner of the real estate, and creditors whose interests are registered within a period of no less than 30 days but no more than 45 days before the auction sale. The notice shall also be posted on the realty and on the court boards notifying of the sales in the court where the property is located and in two daily newspapers. The newspaper cost is at the expense of the lender and the lender may request that the notice be announced or published more than once at the lender's expense. These procedures are very similar to the US model.

Article 20 sets forth the auction procedure. The law makes clear that the property shall be sold to the highest bidder. The lender may not participate in the auction. An interesting procedure provides that the sale shall close within 5 minutes of the highest bid. There is no mention of back up procedures in the event the purchaser fails to close or what happens to the deposit. In the US, generally the deposits are applied to costs and the lender's debt, the lender can sue the purchaser for damages, and he can also resell the property. While it is unusual to take back up bidders in the foreclosure context, in the bankruptcy context, this is a procedure that is routinely undertaken.

Article 20 also provides that in the event the auction does not reach the basic price and is less than the amount due the lender, the lender may ask the Court to award him the property assuming the lender discharges the borrower of all further obligations. If the auction does not reach minimum bid or at least three bidders are not present at the auction, the auction shall be postponed within thirty days. The same procedures regarding the postponed auction must be followed.

Article 21 provides that the borrower can stop the foreclosure at any time before the sale is adjudicated by paying the amounts due the lender including costs of the execution process.

Article 22 requires that the judge must approve the purchase by the bidder at the auction. The judge in his order shall set forth the conditions of sale including the provision that the realty shall be empty of its occupants unless the lender has previously approved the occupation or the lease is registered before the finance agreement.

Article 23 requires that the lender shall register the court's ruling approving the sale. Article 24 provides that an appeal may be taken of the court's ruling approving the sale only on the ground that there was defect in the bidding procedures or an irregularity in the sale procedure. Appeal time is 15 days from the ruling except for the occupant who has 15 days from notification. Article 25 provides that a third party lawsuit for entitlement (ownership of the property) shall not suspend the execution unless the court otherwise rules.

Article 26 provides that the real estate agent must deposit the sales proceeds in the treasury of the court. Article 25 of the 2001 regulations provides that the deposit must take place within 3 days of court ruling approving the sale. The distribution of the proceeds shall be made to the creditors in the order of the priority following the expiration of the appeal time or the loss of the appeal. All expenses of the sale must be paid prior to the distribution. A report of sale must be filed with the Court. Article 26 of the 2001 regulations also provides that the fees of the real estate agent shall not exceed three percent of the sales prices. Such fees shall be approved by the execution judge.

## **Non-Judicial foreclosure options**

In some jurisdictions in the U.S., such as the District of Columbia, non-judicial foreclosures are the norm. In such jurisdictions, under the loan documents, a trustee shall be appointed who upon default of the loan shall notify the borrower of the default and give him the opportunity to cure the default. If the default is not cured by a date certain (usually 60 days from notice), the trustee shall notify the borrower and all parties having an interest in the property by notice of sale and the terms of the sale on a date generally within 30 days from the notice. (Most trustees will have a title examination conducted of the subject property, but they will not have an appraisal of the property conducted. Generally, lenders will have an appraisal done of the property.) Such notice shall be filed with the land records of the jurisdiction. The sales take place in a non court setting usually presided by an auctioneer.

The lender may participate in the bidding (Lenders usually bid up to the amount that would pay the lender off after deducting expenses of the sale and prior liens including taxes on the property). The sale will be made to the highest bidder. The deposit is determined by the lender which usually is no less than 5 percent of the value of the property. Closing on the sale shall take place within 30 days of the auction. The Trustee shall then pay expenses and distribute funds in accordance with the priorities of the creditors and the balance to the borrower. No report of sale is required to be filed with the Court. A deed shall be signed by the trustee and it shall be recorded in the land records.

## **Conclusions**

The foreclosure law is in place and has components to accomplish foreclosure. Unlike the Commercial Code, the new Finance Law sets forth specific procedures in accomplishing the foreclosure. The biggest problem with the law is that it is untested and there are no time limits in place for judges under the law. For example, under Articles 13, 14 and 15 of the law, there are no limits for the judge to decide whether the foreclosure shall be ordered. In Article 16, there is no time limit for the judge to appoint a real estate agent to conduct the foreclosure. Also, there is no time limit for the judge to set the conditions of the real estate agent selling the property by auction. In Article 17, a borrower may ask the court to replace the real estate agent. There is no time limit for the Court to rule on this request. In Article 18, the Court must appoint two appraisers to set the price for the sale, but again there is no time limit for the Court to approve the sale under Article 22.

The new Finance Law also provides for the borrower to slow the foreclosure process. For example, Article 13, 14 and 15 provide that the borrower may contest the foreclosure. Article 17 provides that the borrower can ask the judge to replace the real estate agent.

Certain provisions of the law could slow down the process and are not necessarily useful to the process. For example, Article 18 provides that appraisals must be obtained and the property sold by auction at no less than the appraised price. If the sale is by public auction and appropriate notice is given, why shouldn't the market prevail at whatever price is offered for the property. Consideration should also be given to back up bidder procedures in the event the purchaser at the auction backs out of the sale. Article 20 is silent on this possibility. Also, Article 20 does provide under certain circumstances for the lender to purchase the property but only if the lender is willing to forgive all debt of the borrower. This may be unfair given that the property could have declined in value and the borrower will suffer a loss.

Certain provisions of the law may be impracticable. For instance, Article 20 provides that the sale must conclude within 5 minutes of the highest bid. Many times, it is my experience that a bidder may need to confer with his colleagues or his superiors. Many times, agents bid for someone not present who must be contacted by phone. Notice periods to interested parties such as in Article 19 could be too short depending on the mail system.

Article 20 should also provide for a mechanism to sue the bidder if he does not close. Article 26 deals with turning over money to the court registry. However, there is no mention of what the realtor is to do with the funds prior to that time. Is the realtor bonded in order to protect the lender?

The new law and the regulations do not deal with insolvency and bankruptcy issues. This could be an issue that will require Court intervention and again slow the foreclosure process.

Also, there is a problem some experts will perceive that the foreclosure won't necessarily evict the family members and other tenants from the property once the foreclosure sale

occurs. Therefore the process could take a long time with no certainty in place for the lenders. On the other hand, the lenders are collateralized by other means and are probably not in jeopardy by the lack of time deadlines and fact law has not been tested.

To the extent loans are not being made, it is probably because of the registration problems and not the foreclosure law per se. It is also fair to say the lenders are fearsome, in general, of the court system and delays associated with the courts. My own observations of the Court systems confirm their fears. The lenders have traditionally and still do rely on other collateral and guarantee procedures which seems to work. To the extent the lenders are being encouraged to give up or supplement these procedures, it is appropriate to align the fears of the lenders.

Setting up a non judicial foreclosure system probably is premature since the judicial foreclosure system has yet to be tested and for policy reasons. The Courts are needed to protect the borrowers from losing their homes.

Nevertheless, it will come a time when the foreclosure law will be tested and so in an abundance of caution, it makes sense to press for training of the judges and reasonable time deadlines, keeping in mind the wish of the courts and the social policy of the country to protect borrowers from losing their homes. Although the law is clear that the Execution Judge may issue a writ evicting any occupants of the property, it is also unlikely that the Judges will easily be persuaded to do so.

### **Alternatives avenues based on above analysis and conclusions**

Based upon my analysis and the conclusions described above, I would recommend the following changes:

- A. Work with present foreclosure law and perhaps amend regulations or implement court rules to set strict time tables to speed up and guarantee foreclosure to be complete by date certain. Require bonds to be posted of substantial amount if borrower wants to contest foreclosure. Set up training program for execution judges. We should consider recommending a moot case be established. This seems to be very important since the judges are appointed by the ministry and they are generally prosecutors at the time of their appointment, experts in criminal law and have not practiced civil law. Their experience in the commercial law comes from what they have learned as judges. In a perfect world, it also would be helpful to have specific dates when the judges must rule on the foreclosure application and the realtors must schedule the sales.
- B. Pursue more comments from private attorneys and bankers regarding their views on the foreclosure laws. We should consider setting up training sessions for lawyers.
- C. Take no action until loans go into default. This seems to be a least desirable route to follow since it is inevitable that loans will go into default at some time.
- D. Set up a non judicial foreclosure system. It is doubtful this will be considered since the foreclosure law is a new law and still untested. Furthermore, there is a sense on my part that protection of the borrower is very important and court intervention is necessary for this protection.

**Exhibit 1**

**Key Issues Relating to Foreclosure Under the Real  
Estate Finance Law No. 148 of 2001**

**Submitted by:**

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**Final Draft Report  
August 2005**

## Preface

Hassouna & Abou Ali have been asked by EGYPT FINANCIAL SERVICES PROJECT (“EFS”) to prepare a report that will identify those items in two earlier reports dated June 2005 prepared by Hassouna & Abou Ali and Mr. Mark Albert in response to an earlier SOW in connection with Task 1.1.9 that are of greatest significance and that present an opportunity for practical solution, develop recommended solutions, and work to synthesize this report with the analysis of foreclosure issues prepared by Mark Albert. Such recommendations will be mindful of consumer protection considerations balanced against the need for creditors to feel confident that collateral can be liquidated if a borrower defaults on a loan.

## Deliverables

1. Review the foreclosure report prepared by Albert and provide brief written comments on the issues identified therein to ensure consistency in issue identification and recommendations;
2. Briefly distill the most significant problems with foreclosure detailed in Abou Ali's own report and present follow up written report on most significant items that require reform, with recommended practical solutions, with the goal of synthesizing the Abou Ali and Albert reports. Particular emphasis should be placed on reforms required under the REFL and ER.
3. Prepare brief set of written recommendations for judicial training.

This report is part of a larger endeavor the purpose of which is to address and resolve concerns related to specific foreclosure-oriented provisions of Egyptian Law No. 148 of 2001, known as the Real Estate Finance Law (“Law 148”), the executive regulations and amended regulations thereto (collectively, the Executive Regulations, or “ER”), and under the Egyptian Civil Law on “Real Guarantees”, Articles 1030 through 1084 (“Real Guarantees”).

## A. Foreclosure Background

Foreclosure is a procedure to remove a person's title and possession of real property. After foreclosure, the person will no longer own the property, and will be required in most cases to move and take out all his or her belongings. A foreclosure starts by a person or company, holding a lien on real property. An owner will normally give a lien upon his or her real property as collateral for repayment of a debt. Typically, a homeowner gives a lien on his or her house to the bank as collateral for payment of a loan to the bank. Foreclosure should terminate the rights of all parties whose interest in the property are "subject to" or "subordinate" to the mortgage being foreclosed. The more basic and descriptive purpose of foreclosure, however, is to give the purchaser at the foreclosure sale the same title that the mortgagor had when the mortgage being foreclosed was executed.

Foreclosure on real estate is always complicated and difficult for two reasons, one is economic and the other technical. The economic reason is due to the fact that real estate ownership involves high economic value and is often regarded as the most important property held by an individual. The technical reason is due to the fact that the real property may be charged with rights of third parties, and, therefore, any foreclosure procedures is required to be in their presence since foreclosure may result in the termination of their rights.

These two reasons have impacted historically the foreclosure procedures not only in Egypt but in many European countries as well as in the United States.

The major method of foreclosure in most jurisdictions is the judicial foreclosure, which is the most widely available method in the United States and many other countries and the only method available in Egypt. Because it is a judicial proceeding, judicial foreclosure entails the normal incidents of litigation: service of process on all persons who are necessary parties; formal pleadings; and a judicial trial.

- **Typical Judicial Foreclosure Procedures**

In a typical foreclosure, the lender sends the borrower notice of default and if borrower fails to repay within the specified time, the lender or claimant sends the borrower a summons or foreclosure complaint. Borrower responds to prevent foreclosure and must properly appear and file responsive pleadings in the foreclosure action. Borrower can get the lawsuit dismissed if he makes the entire payment due during court proceedings. If borrower fails to pay and court accepts a default, court summarily enters a foreclosure judgment in favor of the lender (lien holder) against the property owner. Court must find that obligations exist between the property owner and the lien holder, the property owner is in default of the performance of his obligations to the lien holder, and the lien holder is entitled to assert his lien or interest against the real estate. Notice of foreclosure is issued and is filed by the lien holder and contains information on style of foreclosure and description of the property. Borrower can still pay the full amount and prevent consummation of the foreclosure. If borrower does not pay within the redemption period, he or she loses the ownership. The property is sold under court supervision at a public sale or auction and gets paid for the full loan amount. Balance, if any left, goes to the borrower. If the sale amount is less than the loan amount, borrower still owes such balance to the lender. This amount is determined as a result of deficiency proceedings. As a final step, court transfers the deed to the purchaser or new owner.

Frequently, a wrongful foreclosure action is filed in court by the borrower against the foreclosing lender. The wrongful foreclosure action is often brought prior to or in the midst of the judicial foreclosure in order to delay the sale. In most cases, a wrongful foreclosure action alleges that the amount stated as due and owing in the notice of default is incorrect for one or more reasons, including illegal notices of default, incorrect interest rate adjustment, misapplied payments, or illegal sale procedures.

### **General Foreclosure Concerns**

Foreclosed properties frequently sell at a discount to the market price. This may be to the detriment of the borrower. On the other hand, foreclosed homes may be vacant for a substantial time period before they can be sold as the legal process of foreclosure runs its course. During this period, the lender's opportunity costs of holding onto a foreclosed property increases because a property that should have been generating mortgage revenue, generate none. Until a legal decision has been rendered, the property may not be sold.

The ultimate objective of any real estate finance law should be to provide a fair and well balanced treatment as between creditors and debtors with a view of encouraging residential and commercial real estate financing to met market demands. A byproduct of such regime is that it would have the potential to make foreclosures more efficient, benefiting all affected parties.



## **B. Foreclosure Pursuant to Law 148 of 2001**

Foreclosure on real property is mainly regulated pursuant to Articles 401 – 468 of the Code of Civil and Commercial Procedures (Code of Procedure). A modified set of rules apply in cases to which Law 148 of 2001 concerning the Mortgage Finance Law (“Law 148”) (Articles 12 – 27 of Law 148 and Articles 17 – 26 of the Executive Regulations of Law 148 as amended) apply.

Generally, Egypt has in place a judicial foreclosure procedure which contains all of the necessary elements for foreclosure under the new Finance Law of 2001. For instance, notice by lender to all necessary parties is required, filings with the court are required, and the court must approve the foreclosure process in all respects including the employment of brokers and appraisers working on the sale, presumably to protect the borrower from losing his home. There are specific requirements in place for minimum bids. In addition, the lender is prohibited from bidding on the property unless there are no other bids above the minimum and the lender agrees to release the borrower from the deficiency on the loan. The law has deadlines for the lender to send out notices of foreclosure and to file documents in the appropriate government offices. The biggest problem with the law is that it is untested and there are no time limits in place for judges under the law.

Interested parties in a foreclosure under Law 148, including mortgage companies, lenders, MFA and attorneys, put forward several general concerns such as: (i) judicial foreclosures under the Code of Procedures take years to be concluded, and thus will embroil the lender in the court system, (ii) evicting tenants may raise social unrest, (iii) bringing in experts to deal with contests on accounts between lenders and borrowers who routinely dispute the amount of the loan in default and outstanding balances, taking between two and three years, (iv) finding out information regarding ownership of property takes a long time, (v) deficiencies in many of the loan papers, a problem that rests with lenders and (vi) rotation of the judges, thus limiting building up expertise of judges in any area of the law.

Although foreclosure procedures under Law 148 is simpler than the Code of Procedures, with the primary changes being: (i) increased court supervision; and (ii) the introduction of experts to assist the court, there remains areas of key deficiencies. In order, however, to identify areas of deficiencies in Law 148, it is necessary to briefly examine the foreclosure procedures and sequence of expected events according to Law 148. Section D below will use these procedures to point out areas of deficiencies that may have a negative impact on foreclosure under Law 148.

1. Default occurs.
2. Lapse of 30 days from date of default.
3. Lender sends notice of default and demand for payment in 60 days.
4. Starting the 61 day, lender requests Execution Court to affix the execution seal on the finance agreement and order the property attached.
5. Execution Court fixes a session to hear borrower.
6. Borrower is served to attend session at least 8 days prior to the session date.
7. If lender prevails, Court will affix the execution seal.
8. Execution judgment is recorded within 7 days of its issuance.
9. Notice of the Execution judgment is served on the borrower and all creditors with recorded rights as well as the Real Estate Office and borrower is demanded to pay within 30 days.

10. If borrower fails to pay, the lender requests the Execution Court to appoint a realtor to conduct the sale of the property by auction. It is possible for a request to be submitted to the court to change the realtor.
11. The realtor appoints appraisers to determine the property's base sale price.
12. The realtor will put terms and conditions of the sale, including sale date and base price.
13. The realtor will serve notice on borrower, possessor and creditors with recorded rights between 30 and 45 days prior to sale session.
14. Date of sale by public auction.
15. Borrower of given opportunity to pay all outstanding amounts prior to the consummation of the sale procedures.
16. If bid price is lower than set base price, or if there are less than three (3) bidders, a second sale session is fixed between one day and 30 days prior to the new date. Service of the new session shall be made pursuant to the same procedures for the first session.
17. After a bidder is declared as a successful buyer, a sale judgment is issued by the Execution Court.
18. Three (3) days from date of sale, sale proceeds are deposited with the court's cahier.
19. The sale judgment is recorded and the property is declared free of any encumbrances.
20. Sale judgment may be appealed within 15 days of its issuance (or from date of notification with respect to an occupant). Appeal is possible only for defect in the bidding procedures or an irregularity in the sale procedure.
21. Sale proceeds are distributed on creditors if no objection/appeal is made in due time or of any objection appeal is denied.

A detailed commentary on the foreclosure procedure under Law 148 is provided in Annex (A) hereto.

## **C. Alternatives to Foreclosure**

### **Non-Judicial foreclosure option**

In some jurisdictions, including some in the U.S., such as the District of Columbia, non-judicial foreclosures are the norm. In such jurisdictions, under the loan documents, a trustee shall be appointed, who upon default of the loan, shall notify the borrower of the default and give him the opportunity to cure the default. If the default is not cured by a date certain (usually 60 days from notice), the trustee shall notify the borrower and all parties having an interest in the property by notice of sale and the terms of the sale on a date generally within 30 days from the notice. (Most trustees will have a title examination conducted of the subject property, but they will not have an appraisal of the property conducted. Generally, lenders will have an appraisal done of the property.) Such notice shall be filed with the land records of the jurisdiction. The sales take place in a non court setting usually presided by an auctioneer. The lender may participate in the bidding (Lenders usually bid up to the amount that would pay the lender off after deducting expenses of the sale and prior liens including taxes on the property). The sale will be made to the highest bidder. The deposit is determined by the lender which usually is no less than 5 percent of the value of the property. Closing on the sale shall take place within 30 days of the auction. The trustee shall then pay expenses and distribute funds in accordance with the priorities of the creditors and the balance to the borrower. No report of sale is required to be filed with the Court. A deed shall be signed by the trustee and it shall be recorded in the land records.

The prevailing view among Egyptian lawyers appears, however, suspicious of the possibility of introducing a system of non-judicial foreclosure for cultural reasons. Certain constitutional concerns also arise in this respect. Setting up a non judicial foreclosure system probably is premature since the judicial foreclosure system has yet to be tested and for policy reasons. The Courts are needed to protect the borrowers from losing their homes.

#### **D. Legal Concerns under Current Law 148 Foreclosure Regime**

There are two main sets of issues that are of concern to the foreclosure system under Law 148. The first is that the rules of Law 148 are not comprehensive and there appears to be issues that are either left open or which may cause delays and length in time required to finalize a foreclosure (Direct Deficiencies). The second is the referral in Article 27 of Law 148 to the provisions of the Code of Procedures whenever Law 148 is silent with respect to execution on real property, with the consequence of transferring deficiencies under the Code of Procedures to the foreclosure system under Law 148 (Indirect Deficiencies). These two sets of concerns are discussed below.

##### **Direct Deficiencies in Law 148**

Close examination of the procedures and events in light of the objectives of foreclosure and need to simplify and expedite, albeit still with safeguarding borrowers' rights, indicate the following deficiencies that require further attention by the legislature and regulator.

- a. The procedures and rules governing the issuance of the writ of execution (in lieu of notification to expropriate property under the Code of Procedures) are not clear. Does the process take the form of a court case or a request for court order. It is not clear pursuant to Article 13 of Law 148 also what kind of action a judge can take upon hearing the statements of the debtor or the possible effects of these statements on the attachment request. This is a very crucial step in the process to leave in a vague state.
- b. There is no indication as to the procedures and time frame required for the lender to request the Execution Court to affix the execution seal on the finance agreement and order the property attached. Law 148 is silent and resort to the Code of Procedures is a must.
- c. Time periods granted to the borrower from the day of default through judgment to sell is relatively longer than is required to protect the defaulting borrower. A lender has to wait for 30 days of default before sending a notice to the borrower and the lender then grants the borrower another 60 days to pay the outstanding balance before the matter is put to the Execution Court to issue the writ of execution, the procedures for which are not clear (see (a) above). In addition, the borrower retains the right to repay the amount due until the date of sale by auction.
- d. There is lack of time limits on many of the procedures under Law 148. For example, under Articles 13, 14 and 15 of the law, there are no limits for the judge to decide whether the foreclosure shall be ordered. In Article 16, there is no time limit for the judge to appoint a real estate agent to conduct the foreclosure. In Article 17, a borrower may ask the court to replace the real estate agent with no time limit for the Court to rule on this request. In Article 18, the Court is under no deadline to select the appraisers or approve the foreclosure. The appraisers are under no deadline for determining the base sale price. There is no deadline to deal with any objections to the appointment of real estate agent.
- e. Lack of a requirement that the lender provides in the application to issue a writ of execution certain documents so to decrease the potential for later disputes and delays,

- including: (i) copy of the loan and mortgage documents; (ii) copy of all assignment documents (if foreclosing lender received mortgage by way of assignment); (iii) copy of unpaid balance information, with interest rate and loan charges.
- f. The rules regulating determination of the conditions of sale by the real estate agent and the agent's communication with the Court appear to be contradictory. While Article 16 of Law 148 appear to state that the agent is appointed after the lapse of 30 days from the date of serving the writ of execution to the borrower and his non-payment, Article 23 of the Regulations requires the agent to determine the conditions of sale within 15 days from the date of recording the writ of execution.
  - g. Appointment of two appraisers pursuant to Article 17 of Law 148 to determine the base price of the real estate to be sold by the real estate agent could result in two base prices and the law is silent as to how to resolve any discrepancy in this regard.
  - h. Allowing the lender pursuant to Article 20 of Law 148 to ask the Court to award him the property assuming the lender discharges the borrower of all further obligations in the event the auction does not reach the base price and is less than the amount due the lender raises issues of borrowers rights if the actual value of the property is higher than the amount due to lender, particularly when a second opportunity may bring higher price.
  - i. Law 148 is also not clear on the process by which the sale judgment is rendered after having completed the auction procedures. While Article 22 of Law 148 provides that the judge shall issue a judgment to enforce the sale it fails to specify how and when the results of the auction and its procedures are communicated to the judge.
  - j. Law 148 is silent as to the rules and procedures applicable to any objection to the sale judgment, thus referring the matter to the Code of Procedures.
  - k. Law 148 does not deal with the issue of eviction of family and tenants.

### **Indirect Deficiencies in Law 148**

As Stated earlier, the referral in Article 27 of Law 148 to the provisions of the Code of Procedures whenever Law 148 is silent with respect to execution on real property, has the consequence of transferring deficiencies under the Code of Procedures to the foreclosure system under Law 148.

Examination of the Code of Procedures and Law 148 indicates that Articles 401-404, 406-410, 412, 414-416, 429, 432, 433, 435, 436, 438, 440, 444, 446, 447, 452, and 454-458 of the Code of Procedures can apply to foreclosures pursuant to Law 148 on the grounds that these provisions deal in some respect with matter to which Law 148 is silent, thus bringing the deficiencies of the Code of Procedures into the foreclosure system founded by Law 148. Given the novelty of Law 148 and the absence of any real foreclosures there under, it is early to know how the courts would deal with several of these provisions.

Examples of issues that may arise due to the referral to the Code of Procedures are:

- Mechanism to deal with the successful bidder if he does not make necessary payments.
- Manner and regulations on monies received the realtor prior to turning over money to the court registry.
- Issues related to insolvency and bankruptcy.

A detailed examination of the foreclosure procedure under the Code of Procedures is provided in Annex (B) hereto.

## E. Recommendations

The foreclosure law is in place and has components to accomplish foreclosure. Law 148 sets forth specific procedures in accomplishing the foreclosure. Based upon the analysis and the conclusions described above, the following recommendations may be made:

- Work with present foreclosure law and amend the law and regulations and implement court rules to deal with the concerns raised in Section D above.
- Objections by borrower to the foreclosure procedures should be made within certain period, the lapse of which, except for exceptional circumstances determined by the judge should not be accepted.
- Set strict time tables to speed up and guarantee foreclosure to be complete by date certain.
- Require bonds to be posted of substantial amount if borrower wants to contest foreclosure.
- Set up training program to assist lenders on how to properly document mortgage finance transaction to avoid disputes as to outstanding balances with borrowers.

## F. Judicial Training

With the explosion in knowledge bearing on legal disputes and with the emergence of complex litigation, there has been increasing demand worldwide from many judges themselves for programs of continuing education tailored to specific problems and needs. Today in some countries it has become mandatory for judges to get trained periodically to improve their judicial skills and methods of work in the context of technological developments and specialized legal practice. The need for mandatory judicial education is now acknowledged throughout the world and many countries have evolved programs for institutionalized judicial training organized as part of the judicial establishment.

In Egypt, the National Center for Judicial Studies is considered one of the leading judicial training bodies in the region, and has been called upon to play an increasing role in preparing judges for their work. However, there is no requirement today for continuing education courses, in which judges, prosecutors, advocates, professors and other experts serve as teachers for courses.

Real estate is a unique that raises complex legal theories and often unusual fact situations. Judges dealing with Law 148 must have an understanding of the basic principles and business fundamentals of real estate and land transactions.

In pursuance of the above objective, it is recommended that a training calendar offering courses on different topics relating to real estate and land transactions for periods varying between 7 days and 21 days should be offered to judges, particularly those sitting as judges of the execution courts. The Presidents of the courts should be responsible for selecting which judges receive training.

A training program should be not less than three (3) months in total. The programs should include: (i) workshops; (ii) seminars; (iii) training projects; and (iv) training courses.

The training program should not only focus on foreclosure procedures and related bankruptcy and insolvency issues and how it affects creditors and other parties of interest, but should also include contracts for the sale of land, title issues, rights and duties of the parties prior to foreclosure, transfer by mortgagors, recordation of rights and civil procedures.

Upon completion of the training, judges should be given certificates, on the basis of which sitting as an execution judge dealing with real estate and land transactions will be determined.

Methods adopted during the training programs should make use of the latest technology in imparting training and most of guest speakers should make use of the computer to present their lectures and thus judges get the benefit of not only listening to the guest speakers but they also see on the screen various aspects of the lecture presented in the form of photographs and diagrams to allow judges comprehend the subject and are able to sustain the interest through out the lecture. Presentation of Papers is another method to be used to help judges to have mastery over the subject. Judges should as part of the training write a paper on a subject which is kept for discussion during the training program. Another important feature of the training program is to provide judges with study materials/papers, which may contain latest decisions of the high courts on various topics related to real estate and land transaction, not only in Egypt but in other jurisdictions.

## Annex A: Foreclosure in the Context of Real Estate Financing Law

The following set of rules applies in cases where Law 148 of 2001 concerning the Mortgage Finance Law ("Law 148") is applicable. It is noteworthy in this respect that Article 27 of Law 148 provides that the provisions of the Code of Procedures would apply where Law 148 is silent with respect to execution on real property.

Examination of the Code of Procedures and Law 148 indicates that Articles 401-404, 406-410, 412, 414-416, 429, 432, 433, 435, 436, 438, 440, 444, 446, 447, 452, and 454-458 can apply to foreclosures pursuant to Law 148 on the grounds that these provisions deal in some respect with matter to which Law 148 is silent. Given the relative novelty of Law 148 and the absence of any real foreclosures thereunder, it is early to know how the courts would deal with several of these provisions. The discussion below will not assess generally the manner according to which these provisions of the Code of Procedures will interact with the provisions of Law 148 unless where necessary.

1 – **Initiation of Procedures**: Foreclosure procedures pursuant to Law 148 are initiated by a legal warning through court bailiff by the creditor to the debtor-investor to pay amounts which have become due but remain unpaid for a period of thirty days. This warning must be made within at least sixty days (Article 12 of Law 148) [the language of the law is confusing. It specifies a date within which the notice is given but then describes such period as a minimum].

2 – In case of non-payment, all outstanding loan amounts become due and payable (Article 13/1 of Law 148).

3 – **Writ of Execution (in lieu of notification to expropriate property)**: The creditor notifies the debtor to attend before the execution judge to hear his statements on the request the creditor submits to the execution judge to declare the financing agreement a writ of execution and issue order to attach the property in preparation of its sale (Article 13/2 of Law 148). It is not clear the action that a judge can take upon hearing the statements of the creditor or the possible effects of these statements on the attachment request. It is possible that the debtor lodges a court case to determine the true outstanding balance amount.

4 – Should the creditor succeed in obtaining the writ of execution on the financing agreement, the creditor shall notify the debtor and the competent Real Estate Registration Office ("RERO") with such writ together with a demand for payment within a period not less than 30 days. The RERO is mandated to record such notice on the mortgage deed within a period not to exceed one week and shall notify all recorded creditors, including and secured creditors, and the possessor. Failure to notify the recorded creditors or the possessor will result in the unenforceability of the demand of payment against them (Article 14 of Law 148).

5 – **Recordation of Writ of Execution (in lieu of recordation of notification to expropriate property)**: Recordation of the writ of execution with the RERO shall satisfy the requirement of recordation of notification to expropriate the property under the Code of Procedures (see page 2 above) and shall, thus, accrue all of the effects of such recordation of notification to expropriate (see pages 2-3 above), and the property shall be attached as of such recordation.

6 – **Appointing the Agent**: In the event the debtor-investor fails to pay the amounts thus due within the period specified in the notice with the writ of execution, the execution judge

shall upon the request of the creditor, an order appointing a real estate agent ("Agent") from within the list of agents prepared by the competent administration. The appointed Agent shall be required to conduct the sale procedures by way of public auction in the manner provided in Law 148, subject to the direct supervision of the execution judge (Article 16 of Law 148).

7 – **Replacement of Agent**: Any interested party may require the replacement of the Agent upon a request to be submitted to the execution judge together with the reasons for such request. The grounds on which the request is made are not specified in Law 148, although such grounds are required to be serious (Article 17 of Law 148). A request for replacement does not ipso facto stop the execution procedures, but the judge may order the procedures stopped. The judge may also accept the request and appoint another Agent. No time limits are defined for this process.

8 – **Valuing Experts**: Prior to publicizing the sale, the Agent must request two of the valuing experts whose names are registered with the Mortgage Finance Authority to determine the basic sale price (Article 18 of Law 148 and 22 of Executive Regulations). It is not clear what happens if the two valuing experts have two different opinions?. Valuation shall be made pursuant to the following criteria: (i) purchase value, (ii) renovations that took place after the purchase of the property, (iii) effect of inflation on the real estate market, and (iv) the market value at the time of valuation of similar properties in the same area or similar areas (Article 22 of the Executive Regulations). No time limit is specifically set for the valuing experts to fix the value. But Article 23 of the Executive Regulations provides that the Agent should determine the conditions of the sale, including the basic price, at least 15 days prior to the recordation of the writ of execution. This is again confusing since the writ of execution is issued by the execution judge and is recorded within one week thereafter and is notified to the debtor with a period of thirty (30) days to pay. The Agent is only appointed by the execution judge after the lapse of this 30 days and the nonpayment by the debtor and a request for appointment is made by the creditor. Also, it is not clear what happens if there is a request to replace the Agent pursuant to Article 17 of Law 148.

9 - **Conditions of Sale**: The Agent is obligated pursuant to Article 18/2 of Law 148 to determine the conditions of sale, including the basic price. It is not clear whether the Agent must obtain the consent of the execution judge to these conditions when Article 16 of Law 148 provides that the sale shall be under the direct supervision of the execution judge. It is not clear either what consequences would take place due to the Agent's failure to determine the conditions of sale within the specified.

10 – **Notification with Conditions of Sale**: Pursuant to Article 19 of Law 148, the Agent must notify the debtor, the possessor of property (as defined in the law) and the creditors whose rights are recorded (no mention of whether the Tax Authority should also be notified pursuant to Article 108 of The Tax Law No. 91 of 2005) with the conditions of sale prior to the sale with at least 30 days and not more than 45 days.

Law 148 is silent as to the requirement in Article 417(2) of the Code of Procedures to record with the competent RERO the notification of the conditions on the margin of the recordation of writ of execution. Whether this would be required pursuant to Article 24 of Law 148 referred to above is a question mark?

Once notification as described above is made, the persons to whom the notification of the conditions of sale is made become parties to the foreclosure procedures, irrespective of whether the creditor-originator of these procedures remains in it.

11 – **Publication of Sale**: Article 19 of Law 148 requires the Agent to publicize the notification and conditions of sale in two widely circulated daily newspaper and shall also be



hanged at the court's bulletin. Again, no date is specified for such publication. Whether the dates found in the Code of Procedures would apply is not clear?

12 – Given the silence of Law 148 on treatment of objections to the conditions of sale set by the Agent, the question is whether Article 432 of the Code of Procedures would apply. Article 432 allows any concerned person to request a ruling invalidating the publication of the sale pursuant to a report to be filed with the court clerk at least three days before the session set for the sale. The execution judge shall rule on such request on the date set for the sale before the bid opening. No objection or appeal is acceptable to this decision. If a decision of invalidity is issued, the judge shall postpone the sale to a date to be determined by him and the publication procedures shall be repeated. If the request is denied, the judge shall proceed immediately with the sale.

13 – **Sale Procedures**: After the Agent has verified that the concerned parties have been notified with the conditions of sale within the dates specified in Article 19 of Law 148 (Article 24 of the Executive Regulations), the Agent shall proceed with the sale by announcing the basic price. A bidder who offers the highest price and his offer remains unchallenged for five minutes shall be the successful bidder. If the offer is less than the basic price, or if there are less than three (3) bidders, the Agent shall postpone the sale to another day to be fixed within the following 30 days with the same procedures stated in Article 19 of Law 148 as discussed above. The creditor is not allowed to join the bidding; however, if the highest price is less than the basic price and less than the amounts due to the creditor, the creditor may request that the sale be concluded to him against releasing the debtor of all his obligations. This could raise the constitutionality of this provision as it would result in the sale of the debtor's property for less than the valuation amount with no real effort to attempt a second round.

14 - It is not clear what happens if the sale is postponed. Unlike Law 148, the Code of Procedures provides that if no one submits a bid, the execution judge reduces the basic price by ten percent (10%) and a new sale date would be set in not less than 30 days and not more than 60 days from the date of sale session. If no bidder makes a bid again, the same procedures would be repeated until the property is sold (Article 438 of the Code of Procedures).

15 - If, on the other hand, there is a satisfactory bid, the judge will approve the bid (Article 22 of Law 148) but the bid would not be final unless the full price and expenses are paid. The question arises as to the procedures and consequences of not depositing the full price. Law 148 is again silent. The Code of Procedures provides that if the successful bidder deposits only one fifth of the price and expenses, the sale would not be final and another sale session shall be set by the execution judge during which the successful bidder would be expected to pay the balance of the price, in which case the sale would be final if no other bidder makes a higher offer by at least ten percent (10%). If another bidder makes an offer exceeding the offer made by the successful bidder of the previous session, a new bid takes place on the basis of the new price and the previous bid lapses. In case the successful bidder fails to deposit the price and expenses, and no other person makes a higher bid with at least 10%, the bidding procedures shall be repeated. Will these rules apply?

16 - **The Sale Judgment**: A judgment shall be issued to enforce the sale. The judgment shall include an order to deliver the property to the successful bidder free of any occupancy; unless the creditor previously consented to such occupancy pursuant to Article 7 of Law 148, or the occupants are lessees with contracts the dates of which are established prior to the financing agreement. Original copy of the judgment shall then be deposited in the execution file the day following its issuance.

17 - The judgment must thereafter be registered by the successful buyer/purchaser. Issuance of the sale judgment does not transfer title to the successful bidder/buyer because title can only be transferred by registration of the judgment. By issuing the judgment, the execution procedures would be finalized. So, if the debtor is held bankrupt after the issuance of the sale judgment and prior to the registration of the judgment, validity of the registration shall not be affected against the creditors in bankruptcy.

18 - Pursuant to Article 447 of the Code of Procedures, the court clerk shall request the registration of the sale judgment within the three (3) days following its issuance. The registered judgment shall be considered a title deed. Pursuant to Article 25 of Law 148, the Agent shall deposit the sale proceeds with the court's cashier within the three (3) days following its issuance.

19 - **Appeal of The Sale Judgment**: The judgment to enforce the sale shall not be subject to appeal, except for a default in the bidding procedures, or the nullity of the judgment. However, the occupant of the property may appeal the judgment if the judgment included an eviction order. The appeal shall be filed with the competent court of jurisdiction with the 15 days following its issuance, except in the case of an appeal by the occupant, in which case the appeal starts when he is notified with the judgment.

## **Annex B: Foreclosure Pursuant to the Code of Procedures**

### ***I - Foreclosure Procedures***

A real property may be foreclosed only if two main procedures are made: the notification to debtor of the intention to expropriate the property and subsequently, the recordation of such notification.

#### ***1 - Notification to Debtor to Expropriate Property***

This is a court bailiff notification addressed by the creditor to the debtor warning the debtor that if he does not pay the debt in question (after having described such debt and its supporting documents), the notification shall be recorded and the property shall be sold in court supervised auction. The notification shall also describe the property in question.

#### ***2 – Recordation of Notification to Expropriate Property***

After having served the notification to debtor, creditor must record such notification with the Real Estate Registration Office in the area within which the property is located (Article 402 of the Code of Procedures). There is no fixed duration during which the notification must be recorded.

#### ***Effect of Recordation***

The purpose of the recordation is to inform interested parties of the expropriation of the property in question so that, for example, a prospective buyer of the property becomes aware of this fact and that any disposition of the property after such recordation shall not be enforceable against the creditor who has effected such recordation.

Once the property is attached, all the general effects know under the law. These are:

- (i) the property remains in the ownership of the debtor until the sale by auction is completed and the price is paid by the buyer.
- (ii) Although the debtor may dispose of the property such disposition shall be unenforceable against all creditors; and the creditor may proceed with the sale of the property to collect the debt due in spite of such disposition (Article 405 of the Code of Procedures).
- (iii) Lease of the property shall not be enforceable, except for leases in the ordinary course of business and at its equivalent (normal) rental value. Leases entered into prior to recordation of the notification to debtor shall be enforceable as long as they have an established date and are made for a period not exceeding nine (9) years.
- (iv) Rent payable on the attached property is subject to the attachment and the rent must not be paid to the debtor, subject to notification to lessee of the attachment.

#### ***3 – Deposition of Conditions of Sale***

The creditor exercising the attachment procedures is obligated pursuant to Article 414 of the Code of Procedures to deposit the conditions of sale with the court of execution where the

property is located within 90 days from the date of recordation of the notification to debtor of the expropriation.

Failure to deposit the conditions of sale within the specified period renders the recordation of the notification to debtor null and void, thus allowing third part rights to be enforceable against the creditor. In such case the recordation must be made again as a new recordation.

Pursuant to Article 417 of the Code of Procedures, the court clerk must notify the debtor, the possessor of property (as defined in the law), the guarantor, creditors whose notification for payment are recorded, secured creditors whose rights are recorded prior to the notification and the Tax Authority (Article 108 of The Tax Law No. 91 of 2005) with the deposition of the conditions of sale within 15 days of such deposition.

Deposition takes the form of recorded minutes which will set dates for two sessions. A first session to hear any objections made to the conditions and a second session to sell the property if no objections are made in time. The first session shall be fixed after 30 days from the notification to debtor of the deposition. The second session shall within not less than 30 days and not more than 60 days of the first session (if no objections are mad) (Article 419 of the Code of Procedures).

#### ***4 - Recordation of Notification of Deposition***

Article 417(2) of the Code of Procedures requires the court clerk to record with the competent Real Estate Registration Office the notification of deposition within 8 days from its date. The recordation is made on the margin of the recordation of the expropriation of the property.

Once the recordation as described above is made, the persons to whom the notification of deposition is made become parties to the foreclosure procedures, irrespective of whether the creditor-originator of these procedures remains in it.

#### ***5 - Publication of Deposition to the Public***

Article 421 of the Code of Procedures requires the court clerk to publicize the notification of deposition in a daily newspaper and within 8 days from date of notification to the concerned parties in the manner described above. The deposition is also hanged at the court's bulletin within the same period.

### ***II – Objections to the Conditions of Sale***

Conditions of sale are prepared and initiated by the creditor requesting the foreclosure. The law enables others to object to these conditions. Objection is not limited to the terms but include the validity of the foreclosure procedures as well.

Article 422 of the Code of Procedures named the persons who are allowed to submit objections to the conditions of sale as the debtor, the possessor of the property (other than the debtor), the guarantor with real security, the secured creditors referred to in Article 417 of the Code of Procedures and the unsecured creditors who have recorded their respective notification to debtor of the intention to expropriate. Other objectors with interest (such as a lessee) may also submit their objections by way of joining the procedure for objection initiated by others. The initiated of the procedures may also himself file objections intended to amend the conditions for sale if so would provide better terms for the sale.

The types of objections are stipulated in Articles 422 (comments on the conditions of sale) and 425 (enabling third party rights) of the Code of Procedures. Objections pursuant to

Article 422 are either annulment in procedures that took place prior to the session set for review of the objections, or are comments on the conditions aiming at amending the conditions.

### ***Objection Procedures***

The objections should be made to the Court of Execution (court clerk). No services of the objections are made to the interested parties, relying on the prior notification of the session to be held to review the objections.

The objections should also be made within a period not to exceed three days prior to the date set for the session to review the objections. If no objections are made prior to such date, the session fixed to review the objections would be cancelled and the right to file objections would lapse as to those who are notified with the deposition of the conditions of sale.

If objections are made the session fixed to auction the property would be cancelled and execution of the sale would be put on hold until the judge of execution would rule on the objections with final enforceable judgments (Article 426 of the Code of Procedures). The decisions of the judge of execution, whether refusing the objections or amending the conditions, may be appealed, unless the judge of execution rules that the enforcement of the decision can be expedited with or without bond.

### ***III – Sale of the Real Property***

After deposition of the of the conditions of sale and ruling on the objections presented in respect thereof pursuant to final judgments, sale of the real property in question follows. Sale means the issuance of a sale judgment in favor of the highest bidder. Prior to the issuance of the sale judgment, certain procedures are required.

#### ***Procedures Prior to Bidding Session***

It is stated above, that pursuant to Article 414 of the Code of Procedures, the court clerk sets at the time of deposition of the conditions of sale a session to examine the objections and a further session to effect the sale. If objections are made the session set for sale will be cancelled and a new date of sale will be set by the execution judge upon application by the creditor who initiated the procedures, creditors who become party to the procedures pursuant to Article 417 of the Code of Procedures, the debtor, the possessor or the guarantor (Article 435 of the Code of Procedures).

#### ***- Setting a Date for Bidding Session***

Before the execution judge sets another date of sale, the judge must first ascertain that (i) the judgment pursuant to which attachment is effected is final; and (ii) all objections made in time have been ruled upon pursuant to final and executable judgments (Article 426 of the Code of Procedures). The judge shall also observe the limitations on fixing a date pursuant to Article 419 of the Code of Procedures (not less than 30 days and not more than 60 days from the date of the session set for examination of the objections).

#### ***- Publication of the Sale***

The court clerk has the duty of publicizing the sale, whether to the persons identified in Article 417 of the Code of Procedures or to the public at large.

Article 426 of the Code of Procedures requires notification by the court clerk to the debtor, the possessor of property, the guarantor, creditors whose notification for payment are recorded, secured creditors whose rights are recorded prior to the notification and the Tax Authority. The notification will include the date and place of sale. Publication of the date of sale shall take place at least eight (8) days prior to the date set for the sale.

Failure to notify the persons named in Article 426 of the Code of Procedures in the manner required may result in not clearing the property from the rights of those persons (Article 450 of the Code of Procedures). This result, if it happens, causes serious issues to the selected bidder who would have paid the price but is faced with the recourse of those persons against the sold property. The problem seems to be usually a result of the fault of the court clerk who may have missed notifying these persons or one of them with the sale.

In addition to publication to the persons named in Article 416 of the Code of Procedures, Articles 428 – 431 of the Code of Procedures require a publication to the public at large to be made not more than 30 days and not less than 15 days from the date set for the sale. Publication to the public is made in two ways: posting at (i) the entrance to the property, (ii) the police station in the district within which the property is located, and (iii) the publication board of the execution court. Also, the sale shall be publicized by the court clerk in a daily newspaper.

- ***Objection to the Publication of the Sale***

Article 432 of the Code of Procedures allows any concerned person to request a ruling invalidating the publication of the sale pursuant to a report to be filed with the court clerk at least three days before the session set the sale. The execution judge shall rule on such request on the date set for the sale before the bid opening. No objection or appeal is acceptable to this decision. If a decision of invalidity is issued, the judge shall postpone the sale to a date to be determined by him and the publication procedures shall be repeated. If the request is denied, the judge shall proceed immediately with the sale.

***Procedures Related to Bidding Session and Sale Judgment***

According to Article 432 of the Code of Procedures the execution judge can only proceed with the bidding upon a request from the creditor who initiated the procedure, the debtor, the possessor, the guarantor or any debtor becoming a party to the procedures pursuant to Article 417 of the Code of Procedures, otherwise the sale shall be null and void. In the event that if no such request is made up to the date set for the sale, the judge shall delete the sale case and the procedures for sale shall be stopped until a party who is allowed to request the sale submits a request for the sale and a date of sale shall be set again then.

- ***Postponing of the Sale***

Postponing the sale may take place prior to the date of sale if the debtor establishes that the net revenue generated from his assets in one year would satisfy the payment of the attaching creditors and the creditors with recorded rights over the property. Pursuant to Article 424 of the Code of Procedures the debtor may make such request by way of objection to the conditions of sale. If the execution judge accepts the request, the sale date will be postponed and another date will be set in the event that the debtor fails to make the payment.

Postponing the sale may take place also on the date of sale (i) if the judge verifies, as part of his verification duty that all procedures have been complied with, that any of the concerned parties was not notified with the conditions of sale or the sale session date (Article 535 of the Code of Procedures; or (ii) upon the request of a party with legally recognized interest for

strong reason as determined by the execution judge. In any of these two cases, the judge will set another date for the sale, provided that the judge observes that such date is not less than 30 days and not more than 60 days from the date of ruling that the sale date is postponed (Article 441 of the Code of Procedures).

If the sale is postponed, a new publication prior to the new sale session shall be made in accordance with the same conditions of sale. Postponement can take place more than once if there are reasons to support such scenario.

A decision to accept or deny the postponement is within the complete discretion of the execution judge and is not subject to appeal by any means.

#### - ***Stopping of the Sale***

The debtor or the possessor or the guarantor may request execution judge to stop the sale procedures with respect to one of the properties subject to the sale on the basis that the value of the property for which the execution procedures would continue are sufficient to pay the outstanding debts. Such request shall be made by way of objection to the conditions of sale. If the execution judge accepts the request, the sale will be stopped until the creditors are satisfied from the other properties to be sold and only when all debts are satisfied that the sale shall be cancelled. Otherwise, the sale of the property shall resume so to satisfy any remaining debts.

#### - ***The Sale Procedures***

After conclusively resolving all disputes related to the execution of the sale of the property, the execution judge effects the sale by way of public auction on the date and in the place determined through the foregoing procedures.

The sale starts by announcing the basic sale price and related expenses. If no one submits a bid, the execution judge reduces the basic price by ten percent (10%) and a new sale date would be set in not less than 30 days and not more than 60 days from the date of sale session. If no bidder makes a bid again, the same procedures would be repeated until the property is sold (Article 438 of the Code of Procedures).

If, on the other hand, there is a satisfactory bid, the judge will approve the bid but the bid would not be final unless the full price and expenses are paid. If the successful bidder deposits only one fifth of the price and expenses, the sale would not be final and another sale session shall be set by the execution judge during which the successful bidder would be expected to pay the balance of the price, in which case the sale would be final if no other bidders make a higher offer by at least ten percent (10%). If another bidder makes an offer exceeding the offer made by the successful bidder of the previous session, a new bid takes place on the basis of the new price and the previous bid lapses.

In the case, the successful bidder fails to deposit the price and expenses, and no other person makes a higher bid with at least 10%, the bidding procedures shall be repeated.

#### - ***The Sale Judgment***

A judgment shall be issued to enforce the sale. The judgment shall include a copy of the conditions of sale and a description of the procedures that were followed to set the sale date and publicize the sale as well as a copy of the minutes of the sale session and an order to the debtor or the possessor or the guarantor to deliver the property to the successful bidder.

Original copy of the judgment shall then be deposited in the execution file the day following its issuance.

Issuance of the sale judgment does not transfer title to the successful bidder/buyer because title can only be transferred by registration of the judgment.

By issuing the judgment, the execution procedures would be finalized. So, if the debtor is held bankrupt after the issuance of the sale judgment and prior to the registration of the judgment, validity of the registration shall not be affected against the creditors in bankruptcy.

Pursuant to Article 447 of the Code of Procedures, the court clerk shall request the registration of the sale judgment within the three (3) days following its issuance. The registered judgment shall be considered a title deed.

- ***Effect of The Sale Judgment***

The judgment to enforce the sale is not required to be publicized. Its execution is enforced by summoning the debtor, or possessor or the guarantor or the custodian, as the case may be, to attend at the place of delivery on the date and time set for such delivery; provided that such summons shall be made at least two (2) days before the delivery date.

***The Recorded Rights:***

According to Article 450 of the Code of Procedures, registering the judgment will result in releasing the sold property from all priority rights, liens and mortgages that holders thereof have been notified with the deposition of the conditions of sale and the date of the sale session pursuant to Articles 417 and 426 of the Code of Procedures. Their rights will continue only against the price received from the sale. These recorded rights are defined as such only if they are recorded prior to the recordation of the notice of expropriation. Any rights recorded after such notice of expropriation has been recorded shall not be enforceable pursuant to Article 405 of the Code of Procedures.

- ***Appeal of The Sale Judgment***

The judgment to enforce the sale shall not be subject to appeal, except for a default in the bidding procedures, or the form of the judgment or its issuance after refusing a request to stop the procedures in case such action is mandated by the law. Appeal shall be filed in the ordinary appeal procedures within the five (5) days following its issuance.